IN THE SUPREME COURT OF THE STATE OF MONTANA

Number DA 10-0122

T.G.C. and M.C.,

Petitioners and Appellees,

v.

M.C.M.,

Respondent and Appellant

REPLY BRIEF OF THE APPELLANT

On Appeal From
Montana First Judicial District Court, Lewis & Clark County
Before the Honorable Jeffrey M. Sherlock

APPEARANCES:

Lori A. Harshbarger
JD Law Firm, P.C.
336 Waterloo Road
Whitehall, MT 59759
Ph: (406) 287-7933
Fax: (406) 287-3175
Email: jdlawfirm@msn.com

Attorney for Respondent-Appellant

Charles A. Smith
Attorney at Law
1 N. Last Chance Gulch
Helena, MT 59601
Ph: (406) 442-4840
Fax: (406) 442-4164

Attorney for Petitioner-Appellee

TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES CITED

STATEMENT OF THE ISSUES

The issues before the Court are:

1. Whether the District Court erred in terminating Appellant's parental rights based on its Conclusion that she was unfit and had abandoned the children;
2. Whether the District Court erred in terminating Appellant's parental rights based on its Conclusion that she had failed to support her children;
3. Whether the District Court erred in granting the Decree of Adoption of M.C.M's children by Appellees.
4. Whether Appellees Notice of Appeal was filed timely?

SUMMARY OF ARGUMENT

I. The District Court erred by finding M.C.M. was unfit and had abandoned the children;

II. The District Court erred by finding that M.C.M. had failed to support her children;

III. The District Court erred in terminating M.C.M.'s rights and granting the Decree of Adoption of M.C.M's children by Appellees.

IV. M.C.M.'s Notice of Appeal was filed timely and should not be dismissed.

ARGUMENT

As an initial matter, error exists in the Statement of the Facts in the Response brief. On page 2, lines 15-16, the T.G.C. and M.C. state M.C.M. has a serious drug problem with reference to Tr. p. 11, ll. 18-25; p. 23, ll. 1-2; p. 29, ll.2-10. Nowhere in the transcript was there testimony or evidence that M.C.M. had a "serious drug problem". In Tr. p. 29, ll 2-10, what M.C.M. actually testified was "After that, I had some trouble, and I did relapse, I used marijuana. I also did some other things. Then my probation officer decided that I would need treatment." Some trouble, relapse and used marijuana do not equate to a serious drug problem, but do equate to someone with problems who needed help.

In their Response Brief, T.G.C. and M.C. erroneously argue that M.C.M.'s Notice of Appeal was untimely filed and that this Court does not have jurisdiction to entertain this Appeal and therefore must dismiss it. This Argument fails for two reasons.

First, M.C.M. never received a Notice of Entry of Judgment terminating her rights. She only received a copy of the Order of Termination from the Court, which is why there was no copy of a Notice of Entry of Judgment attached to her opening brief.

T.G.C. and M.C. however, allege in their Response Brief on page 13, last line and page 14, lines 1-3 that they served a Notice of Entry of Judgment

terminating M.C.M.'s rights to the children upon M.C.M. on January 24, 2010. If it was sent, it was never received.

Montana law is clear that in accordance with M.R.Civ.P., Rule 77(d), within 10 days after entry of judgment or an order in an action in which an appearance has been made, notice of such entry, together with a copy of such judgment or order or general description of the nature and amount of relief and damages thereby granted, shall be served by the prevailing party upon all parties who have made an appearance. According to Rule 77(d), T.G.C. and M.C. should have sent the Notice of Entry of Judgment by January 19, 2010.

There have been previous instances in the lower court proceeding when M.C.M. was not served with copies of pleadings. ----------

The second reason T.G.C. and M.C.'s argument for dismissal of this appeal must fail is that according to §42-2-620, M.C.A. there is a 6 month deadline to question any judgment for termination of parental rights.

> **§42-2-620, M.C.A** Subject to the disposition of a timely appeal, upon expiration of 6 months after an order terminating parental rights has been issued, the order may not be questioned by any person, in any manner, or upon any ground including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or subject matter.

In *Matter of T.H. and C.D.F.,* (2005) 328 Mont. 428, 121 P.3d 541, this Court dealt with this particular issue. In *T.H.*, the Department alleged that the

Mother's appeal was untimely for not having been filed within the time limit required by Rule 5 of the M.R.App. P. (the equivalent of the current Rule 4). This Court emphasized in *T.H.,*¶22, the Department had an affirmative duty to serve the Mother with notice of entry of judgment; that the Mother had no "affirmative duty" to file a notice of appeal before **receiving** (emphasis added) the service of notice of entry of judgment. This Court further held that a parent's right to the care and custody of a child is a fundamental liberty interest which must be protected by fundamentally fair procedures. *Id.*

Additionally, this Court held in *P.D.L.*, (2004) 324 Mont. 327, 102 P.3d 1225 that §42-2-620, M.C.A. attempts to provide finality to the termination of parental rights proceedings so that a child may be safely adopted without the treat of the adoption being set aside at some future date. This Court, citing *P.D.L.*, in *T.H.* ¶*17,* found that the usual deadlines for appeal found in Rule 5, M.R.App.P. apply to termination cases but also does §42-2-620 apply with regard to a "timely appeal".

In the instant case, M.R.App. P. Rule 4 must be applied in conjunction with §42-2-620, M.C.A. Assuming this Court was to adopt T.G.C. and M.C.' argument that the time to appeal the termination order began on January 24, 2010 and therefore, pursuant to M.R.App. Rule 4, the time to file Notice of Appeal of the termination was February 23, 2010, according to §42-2-620, M.C.A., M.C.M.'s

time to question, in any manner, upon any ground, the order of termination of parental rights entered by the District Court on January 5, 2010 would not have expired until June 5, 2010. This Notice of Appeal was filed on March 12, 2010 and therefore, M.C.M. had until June 5, 2010 to file her Notice of Appeal. T.G.C. and M.C.' argument must fail.

In their Response Brief, T.G.C. and M.C. argue that the evidence is uncontroverted that M.C.M. left her children under the circumstances that make reasonable the belief that she did not intend to resume care of the children in the future, relying heavily on the fact that M.C.M. did not petition the Court to resume custody of the children within 6 months after the T.G.C. and M.C. had become their legal guardians. As M.C.M. stated in her opening brief, 4 months after said date, M.C.M. was incarcerated and remained such until after the Petition to Terminate and Adopt was filed.

As asserted in her opening brief, at that time, M.C.M. was in no position to petition the Court. She couldn't even take care of herself. The only choice M.C.M. had was to make sure her children were safe and that she got help, which she did successfully.

T.G.C. and M.C. cite *Matter of P.E.* (1997), 282 Mont. 52, 934 P.2d 206, in which this Court held that the biological mother's actions spoke louder than words when it came to the question of whether she had manifested a firm intention to

retake physical custody of her daughter. In *P.E.*, this Court held that the case rested on a factual determination of what actions are sufficient to constitute the manifestation of "a firm intention to resume physical custody." § 41-3-102(7)(e), MCA.

In this instant case, T.G.C. and M.C. argue that in addition to the fact that M.C.M. did not petition the Court for custody of the children that failed to contribute to the financial support of the children since 2002. This argument is not substantiated by the record.

The children resided off and on with T.G.C. and M.C. and M.C.M. from their birth until 2007. While the children resided with M.C.M., she supported and took care of her children. T.G.C. and M.C. were not the sole support of the children. While they have and do provide support to the children, for which M.C.M. is grateful, she has also done so and would be able to do so now.

This is not a case where M.C.M. walked away from her children and left them without care. She willingly asked T.G.C. and M.C. to help her with the children on and off. In fact, at her dissolution in 2007, she willingly requested the children reside with T.G.C. and M.C. until she could get her life together. She believed that the children were safe and she would resume custody after she got out of pre-release. Conveniently, T.G.C. and M.C. filed the Petition to Terminate and Adopt about the time M.C.M. was scheduled to be release. At that point,

M.C.M. did file notice with the Court that she wanted to terminate the guardianship, which was never addressed by the Court. [1]

T.G.C. and M.C. argue that M.C.M. could have seen the children more if she wanted to and could have had them living with her more, which is ludicrous. M.C.M. was incarcerated! She had no control over when the children visited here. They could not live with her in jail!

There was no evidence introduced at the hearing to substantiate that terminating the fundamental rights that M.C.M. has to her children forever, was in their best interest; or that by clear and uncontroverted evidence, that M.C.M. willfully abandoned her children with the intention to never resume custody. The only clear and uncontroverted evidence was that M.C.M. had a problem with drugs and alcohol for which she sought treatment and has remained successful; that she asked the T.G.C. and M.C. to help her with the children, believing that they would do so and that they would never "take" them from her; and that she finally is in a spot where she can be a parent to her children right when she was deprived of that fundamental liberty.

---

[1] See section B of the Appendix to Appellant's Opening Brief.

CONCLUSION

T.J.C. and M.C. have failed to provide clear and convincing evidence that the statutory requirements for termination and adoption have been met. A parties' right to the care and custody of a child is a fundamental liberty and must be protected by the Court. M.C.M.'s problems with drugs and alcohol have been successfully overcome and are the reasons for the problems she encountered which led to her children residing with T.J.C. and M.C. Her non-payment of child support throughout the times that the children resided with T.J.C. and M.C. were due in large part to her inability to work due to incarceration and the underlying drug and alcohol problems. She was not unwilling to support her children; simply unable. When M.C.M. learned that this action to terminate her parental rights had been filed, she immediately filed her intention to terminate T.J.C. and M.C.'s guardianship, which was ignored. M.C.M. has worked diligently and successfully to overcome her problems. The District Court erred in its conclusion without clear and convincing evidence and its judgment to terminate and for adoption should be overturned and M.C.M.'s children should be returned to her or at the very least, this matter should be remanded to the District Court for a rehearing, after appointment of a guardian ad litem for the children and adequate evidence presented to conform with the statutes.

Respectfully submitted this 2nd day of July, 2010.

JD LAW FIRM, P.C.

BY: _____
Lori A. Harshbarger

Attorney for Appellant

CERTIFICATE OF SERVICE

I, LORI A. HARSHBARGER, hereby certify that the foregoing was duly served upon the respective attorneys for each of the parties entitled to service by depositing a copy in the United States Mail postage prepaid, addressed to each at the last known address as shown on this page on the 2nd day of June, 2010.

Charles Smith
Attorney at Law
1 N. Last Chance Gulch
Helena, MT 59601

JD LAW FIRM, P.C.

BY: _____
LORI A. HARSHBARGER

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Word 2007 is not more than 10,000 words (5,000 for reply), not averaging more than 280 words per page, and is not more than 30 (14 for reply) pages, excluding Certificate of Service and Certificate of Compliance.

JD LAW FIRM, P.C.

BY: _____
LORI A. HARSHBARGER